79-6330

Supreme Court, U. S.
FILED
MAR 28 1980
[illegible], JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. A-625

WILLIAM ANTHONY BROOKS,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

JOHN J. CALLAHAN
Secor, Ide & Callahan
645 National Bank Bldg.
Toledo, Ohio 43604
Telephone: 419/243-2101

THEODORE R. VOGT
1200 Edison Plaza
Toledo, Ohio 43604
Telephone: 419/255-8220

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities	1
Opinion Below	2
Statement of Jurisdiction	2-3
Questions Presented	3
Constitutional Provisions and Statutes Involved	4-7
Statement of the Case	7-9
How Federal Question Is Presented	9-10
Reasons for Granting the Writ	11-18
Conclusion	18
Appendix:	App. 1-19
Opinion of the Supreme Court of Georgia	App. 1-14
Charge of the Trial Court to the Jury	App. 15-19

TABLE OF AUTHORITIES

Cases:	Page
Coker v. Georgia, 433 U.S. 584 (1977)	18
Furman v. Georgia, 408 U.S. 283 (1972)	10,11,12,13,14,16
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	12
Godfrey v. Georgia, Docket No. 78-6899, U.S. Supreme Court	10,13,18
Gregg v. Georgia, 429 U.S. 153 (1976)	10,11,12,13,17
Herndon v. Lowry, 301 U.S. 242 (1937)	12
Jurek v. Texas, 428 U.S. 262 (1976)	16,17
Lockett v. Ohio, 438 U.S. 586 (1978)	11,12,13,15,17
NAACP v. Button, 371 U.S. 415 (1963)	12
Potts v. State, 241 Ga. 67, 243 S.E. 2d 510 (1978)	15
Profitt v. Florida, 428 U.S. 242 (1976)	17
Silber v. U.S., 370 U.S. 717 (1962)	10
Smith v. Goguen, 415 U.S. 566 (1974)	12
Spivey v. Georgia, 241 Ga. 477, 246 S.E. 2d 288, cert. den. 439 U.S. 1039 (1978)	9,15,16,18
Thomas v. State, 240 Ga. 393, 242 S.E. 2d 1 (1977)	15
U.S. v. Atkinson, 297 U.S. 157 I1936)	10
Vachon v. New Hampshire, 414 U.S. 478 (1974)	10
Woodson v. North Carolina, 428 U.S. 280 (1976)	11,12,15

Statutes:	
Georgia Code, Section 26-1101	4
Georgia Code, Section 26-3102	3,13
Georgia Code, Section 27-2534.1	3,4,5,6,11,12,13,15
Georgia Code, Section 27-2537	6
United States Code, Title 28, Section 1257	2

Constitution:	
Fifth Amendment to United States Constitution	4
Eighth Amendment to United States Constitution	3,13
Fourteenth Amendment to United States Constitution	3,13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-625

WILLIAM ANTHONY BROOKS,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari

To The Supreme Court Of Georgia

Petitioner herein, William Anthony Brooks, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia entered in this matter on October 30, 1979.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, 261 SE 2d 379. A copy is appended hereto at pages App. 1-14.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia entered judgment affirming the judgment of the Muscogee County Superior Court on October 30, 1979. Mr. Justice Powell, on January 23, 1980, entered an order extending the time for filing a petition for a writ of certiorari to and including March 28, 1980.

Jurisdiction of this Court is invoked under Title 28, Section 1257 (3), United States Code, because the Georgia courts

have denied the Petitioner rights, privileges and immunities guaranteed him under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether Sec. 27-2534.1(b)(7) of the Georgia Code, designating an aggravating circumstance in capital cases, is so broad and vague as to violate the 8th and 14th Amendments to the Constitution of the United States.

2. Whether Sec. 26-3102 of the Georgia Code which provides, in part, that "where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as prescribed by law," as construed by the Supreme Court of Georgia, grants to the jury such an arbitrary power to withhold the death penalty, or a discretion so unlimited by guides, standards or reason in withholding that penalty, as to violate the 8th and 14th Amendments to the Constitution of the United States.

3. Whether, in death penalty cases, jury instructions which (1) fail to instruct the jury to focus on the character and record of the defendant and the circumstances of the offense, (2) fail to direct the jury's attention to the specific mitigating circumstances as warranted by the evidence in the case, and (3) do not guide the jury to weigh mitigating circumstances against aggravating circumstances, comply with the requirements of the 8th and 14th Amendments to the Consitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the Code of Georgia:

> Section 26-1101: "Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> "(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> "(c) A person convicted of murder shall be punished by death or by imprisonment for life."
>
> Section 26-3102: "Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."
>
> Section 27-2534.1: "Mitigating and aggravating circumstances; death penalty. (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful

arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the [statutory] aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

Section 27-2537: "Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1 (b), and

"(3) Whether the sentence of death is excessive or disporportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

Petitioner was indicted for murder, kidnapping, rape and armed robbery. After a 3-day trial at which he did not testify, he was found guilty on all four counts.

Prior to considering the penalty to be imposed, the jury was instructed by the Court as to its consideration of aggravating and mitigating circumstances which may have existed

at the time of the murder. A copy of the Court's instructions is appended hereto at pages App. 15-19.

In the penalty phase of the trial, the defense offered the testimony of petitioner's mother and sister that the petitioner was raised in a broken home and was severely beaten and mistreated by his stepfather. In his argument to the jury, defense counsel emphasized the biblical proscription against killing, referred briefly to the petitioner's mistreatment by his stepfather, and argued that the State's case for conviction rested on circumstantial evidence and, principally, on the petitioner's confession.

An important mitigating circumstance was mentioned in the petitioner's confession put in evidence by the State. The petitioner stated to his interrogators that he warned the victim to stop screaming, then threatened her with his gun and she did not stop. It was only after the victim's continued screaming following the warning and the gesture with the gun that petitioner shot her.

The trial court, in identifying the statutory aggravating circumstances, ended each reference with the words "and we recommend the death penalty." Then he instructed the jury that even though they found aggravating circumstances, they could refuse to recommend the death penalty. He did not, however, end that instruction with the words "and we do not recommend the death penalty."

Having concluded reading the written instructions which, under Georgia law, are taken into the jury room, the trial court continued with a "summation" referring to "three verdicts that you may return in this case," which verdicts were not the same either in form or number as those in the written instructions taken into the jury room.

Although the trial court gave repeated emphasis to the statutory aggravating circumstances, he did not direct the jury's attention to the specific mitigating circumstances which were

properly in evidence; he did not instruct the jury to weigh the mitigating circumstances against the aggravating circumstances and he did not tell the jurors that they must consider the character of the defendant and his record as well as the nature of the offense.

The jury returned its verdict as follows:

> "We, the jury, find the following aggravating circumstances: armed robbery, rape, and the offense of murder was outrageously or wantonly vile, horrible and inhuman, in that it involved depravity of mind to the victim [sic], and we recommend the death penalty, this 18th day of November, 1977 . . ."

The Court at no point in its charge told the jury that "depravity of mind" of the defendant could be considered as an aggravating circumstance. The jury, therefore, found an aggravating circumstance on which it had received no instruction from the Court.

In addition to finding that depravity of mind existed at the time of the murder, the jury also found that the murder was committed while the defendant was engaged in the commission of rape and armed robbery. The jury recommended the imposition of the death penalty and the Court accordingly sentenced the petitioner to death for the crime of murder.

HOW FEDERAL QUESTION IS PRESENTED

The questions raised by this petition were not specifically presented to the Georgia courts. But they were sufficiently raised and considered by the Supreme Court of Georgia to sustain this Court's jurisdiction.

The propriety of the instructions given in the sentencing phase was considered by the Georgia Supreme Court as part of its mandatory review in death penalty cases. Although the opinion does not explicitly state that the issue was resolved on federal grounds, the Court relied on Spivey v. Georgia, 241 Ga. 477, 246 S.E. 2d 288 (1978), cert. den., 439 U.S. 1039 (1978),

which purported to decide the issue of death penalty instructions based upon this Court's earlier holdings in Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 238 (1972), which made the adequacy of death sentence procedures matters of federal constitutional law.

Jurisdiction of this Court to review is also supported by the fact that this case involves the death sentence, a penalty which is unique and irreversible in nature. Further, this Court has the power to notice "plain error" even though the issue was not raised "in constitutional form" in the state courts. Vachon v. New Hampshire, 414 U.S. 478 (1974). Finally, this Court has reiterated that:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." Silber v. United States, 370 U.S. 717, 718 (1962) [quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)].

The first question presented by this petition is now pending before this Court in Robert Franklin Godfrey v. The State of Georgia, No. 78-6899, argued February 13, 1980.

REASONS FOR GRANTING THE WRIT

I.

Section 27-2534.1(b)(7) of the Georgia Code is so broad and vague that it violates the Petitioner's rights under the 8th and 14th Amendments. Designating an aggravating circumstance to be considered by the trier of fact in capital cases, the section reads as follows:

> "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."

Can the terms, "vile, horrible or inhuman," used individually or in combination, objectively direct the discretion of a jury considering the death penalty in compliance with the mandates of the 8th and 14th Amendments as declared in Furman v. Georgia, 408 U.S. 283 (1972); Gregg v. Georgia, 429 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978)?

The words clearly permit a highly subjective, personal interpretation. Because of their subjective nature, the circumstances described by such words are incapable of being found beyond a reasonable doubt to be facts. How does one find, or prove, beyond a reasonable doubt that a murder is vile, or is horrible, or is inhuman? How can one not find that the taking of another human life is anything other than vile, horrible and inhuman?

Can the three adjectives taken together be more definite or objective than each separately? The piling of three vague subjective terms one upon the other does not result in an objective standard. The terms "murder" and "inhuman" are co-extensive. Except when the State kills, it is generally agreed that the taking of the life of another human being is inhuman.

The term "inhuman" cannot be set up as an objective standard to guide jurors in finding some special circumstance in a case beyond the fact of murder, nor to find so beyond a reasonable doubt in order to justify the death penalty. The terms "vile" and "horrible" are subject to the same criticism.

Fundamental to a constitutionally valid sentencing procedure in capital cases is a provision for "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, supra, at 303. Sentencing discretion in death cases must be "circumscribed by the legislative guidelines," Gregg v. Georgia, supra, at 207, demanded by Furman and later cases as an indispensible command of the 8th and 14th Amendments. Lockett vs. Ohio, supra, at 601. "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, supra, at 189.

Section 27-2534.1(b)(7) of the Georgia Code is also void for vagueness under the traditional due process concepts embraced by the 14th Amendment. Due process forbids the imposition of sanctions under any procedure that "licenses the jury to create its own standard in each case," Herndon v. Lowry, 301 U.S. 242, 263 (1937); Giaccio v. Pennsylvania, 382 U.S. 399 (1966), and is "susceptible of sweeping and improper application," NAACP v. Button, 371 U.S. 415, 433 (1963). "Moreover it requires legislation to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'." Smith v. Goguen, 415 U.S. 566 (1974).

The fate of the petitioner herein turned upon the

application to his case by twelve persons of a statutory phrase that is completely subjective in nature. While other capital defendants might be spared, the petitioner is condemned because jurors may differ in their personal interpretation of what the words "horrible, vile or inhuman" mean and how one or all of these terms apply to a particular case.

Since the words, used either together or singularly in the disjunctive sense, provide no "meaningful basis for distinguishing the . . . cases in which a death sentence . . . is imposed from . . . the many cases in which it is not," Lockett v. Ohio, supra, at 601, the petitioner's death sentence is wholly capricious and arbitrary and cannot stand.

Section 27-2534.1(b)(7) of the Georgia Code is precisely the kind of vague standard forbidden by the 8th and 14th Amendments to the Constitution.

This identical claim is now pending before this Court in Robert Franklin Godfrey v. The State of Georgia, No. 78-6899, argued February 13, 1980.

II.

Section 26-3102 of the Georgia Code which provides, in part, that "[w]here a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law," as construed by the Georgia Supreme Court, grants to the jury such an arbitrary power to withhold the death penalty, or a discretion so unlimited by guides, standards or reason in the withholding of that penalty, as to fail to comply with the mandates of the 8th and 14th Amendments as declared in Furman and Gregg. In the latter case the plurality opinion states "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion

must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

In Thomas v. State, 240 Ga. 393, 242 S.E. 2d 1 (1977), the Georgia Supreme Court quoted with approval the following charge of the trial court:

> "If you find beyond a reasonable doubt that the State has proved the existence in this case of either one or more of the aggravated circumstances, as contended for by the State and as given you in charge by the court, then you would be authorized to recommend the imposition of sentence by death. But you would not be required to do so.
>
> "If you find beyond a reasonable doubt that the State has proved the existence in this case of one or more of the aggravated circumstances contended for by the State and given you in the charge by the court, you would be also authorized to recommend the defendant to the mercy of the court. Which is a recommendation you may make either with or without a reason. You may make it for any reason that is satisfactory to you or without a reason. You may make it arbitrarily, as a matter of course or as a matter of discretion." (Underscore added.)

In the instant case, on this point, the trial court charged the jury "[E]ven though you find statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment." There were no guides, standards or reasons given the jury to use in arriving at the recommendation refusing to impose the death penalty; no reference to what they might or might not consider in arriving at that conclusion, nothing to "minimize the risk of wholly arbitrary and capricious action."

In Furman, at 314, Mr. Justice White said:

> ". . . [P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the

> discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment."

Petitioner submits that precisely the same violation occurred in this case by reason of the inadequacy of the charge to the jury.

III.

In Lockett v. Ohio, at 604, the plurality opinion concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or recor and any of the circumstances of the offense . . ." (Underscore added.) In Lockett, Woodson is referred to as concluding that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

The Georgia Code provides at Section 27-2534.1(b) that "In all cases . . . for which the death penalty may be authorized, the judge . . . shall include in his instructions to the jury for it to consider, any mitigating circumstances . . ." Section 27-2534.1(c) provides that "The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation."

In construing these sections, the Georgia Supreme Court has held that mitigating circumstances need not be "singled out" in the judge's instructions to the jury. Spivey v. State, supra. In that case the Georgia Supreme Court cited Thomas v. State, supra, and Potts v. State, 241 Ga. 67, 243 S.E. 2d 510 (1978), as rejecting the argument that the trial court must single out and name in

the charge circumstances which defendant claims are mitigating. The reason behind that ruling was that Georgia law nowhere defines mitigating circumstances.

The Georgia Supreme Court cites Jurek v. Texas, 428 U.S. 262 (1976), as supporting the proposition that mitigating circumstances need not be defined or singled out in the charge to the jury. But Jurek held that the Texas procedure required the jury to answer two broadly encompassing statutory questions, in the process of considering which the jury would necessarily be guided to and focus on all mitigating circumstances supported by relevant evidence. The Georgia Supreme Court, in Spivey, concluded that "The conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating, without limitation or definition. This is a constitutionally valid procedure." (Underscore added.)

Petitioner submits that the Georgia Court could not have intended a literal reading of that language. A jury could not properly be free to consider an aggravating circumstance as mitigating; nor could it properly be free to consider, in mitigation, circumstances which are not supported by relevant evidence in the case before it. Any such procedure would not be constitutionally valid. It must be remembered that Furman requires that the death penalty not be withheld through arbitrariness or caprice just as it requires that it not be imposed in such fashion.

It is not reasonable to suppose that, because the legislature did not define a term, that the courts are not permitted, or that they have no duty, to develop a workable definition of that term on a case by case basis.

The trial judge in the case at bar did not instruct the jury to consider the characteristics of the defendant as well as the nature of the offense. His failure to do so squarely

conflicts with Lockett, Jurek, Gregg and Profitt v. Florida, 428 U.S. 242 (1976).

The trial judge in the case at bar did not enumerate the mitigating circumstances which were supported by relevant evidence and thus proper for the jury to consider. This court's decisions in Lockett, Jurek and Profitt require that particular mitigating factors, relevant in light of the record, be called specifically to the jury's attention so that they might be weighed against the aggravating circumstances which the trial court did call to the jury's attention. Here such items of mitigation included the petitioner's limited education, his history of emotional tension resulting from a broken home, beatings by his stepfather, and, most important, the fact contained in petitioner's confession introduced by the State, that the victim began to scream and in spite of repeated warnings, persisted in screaming until he shot her.

Contrary to the construction given by the Georgia Supreme Court, it is reasonable to conclude that the Georgia statutory scheme does require the trial court to itemize the mitigating circumstances in his charge to the jury. How else can the judge instruct the jury to consider mitigating circumstances "as warranted by the evidence?" How does the instruction, "in arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant," serve to guide or control the jury in its deliberations or to focus on the character and record of the defendant and the circumstances of the offense?

The trial judge in the case at bar did not charge the jury to weigh the mitigating against the aggravating circumstances. Under the Model Penal Code, referred to in Gregg at 193, n. 44, and under the Florida statute approved in Profitt, the sentencer is specifically informed that it should weigh mitigating against

aggravating circumstances. Similarly in Jurek the questions which a jury must answer before imposing the death sentence necessarily require such balancing. This Court in Coker v. Georgia, 433 U.S. 584 (1977), at 589-91, also assumed such an instruction was required.

The dissent in Spivey concluded that the "incoming tide of death penalty cases" had "worn away the court's resolve" to insist upon appropriate instructions where life is at stake. Such a "tide" makes it all the more important that this Court review this case. Petitioner submits that what really has been "worn away" is the constitutionality of the Georgia statutory scheme, as it appeared to this Court in Gregg.

CONCLUSION

This case presents a constitutional question which this Court has deemed of such significance to the administration of justice in capital cases in the State of Georgia that it is at the present time reviewing a related question in the case of Robert Franklin Godfrey v. The State of Georgia, No. 78-6899. For this reason and for the other reasons stated herein, this petition should be granted and a writ of certiorari issued to the Supreme Court of Georgia.

Respectfully submitted,

JOHN J. CALLAHAN
Secor, Ide & Callahan
645 National Bank Building
Toledo, Ohio 43604

THEODORE R. VOGT
1200 Edison Plaza
Toledo, Ohio 43604

Attorneys for Petitioner

YOU ARE TO NOTIFY THE DEFENDANT OF THIS DECISION WITHIN 5 DAYS.
743

In The Supreme Court of Georgia

Decided: OCT 30 1979

34813. BROOKS v. THE STATE.

Jordan, Justice.

Appellant-defendant, William Anthony Brooks, was indicted on August 16, 1977, by the Muscogee County grand jury for the crimes of murder, kidnapping, rape, and armed robbery. On Nov. 18, 1977, the jury found appellant guilty on all four counts, and after specifically finding the existence of statutory aggravating circumstances, recommended the death penalty for the crime of murder. Accordingly, the trial court, on Nov. 18, 1977, sentenced the appellant to death for the crime of murder, to life for kidnapping and rape, and to twenty years for armed robbery. The case is here on appeal and mandatory review of the death penalty.

I. THE EVIDENCE.

A summary of the evidence is as follows: On the morning of July 15, 1977, the appellant, while walking along Saint Mary's Road in Muscogee County, Georgia, noticed Carol Jeannine Galloway, age 23, in the frontyard of her parents' residence. The appellant accosted Miss Galloway at gunpoint with instructions that she get into her car, valued at $3,500, and drive the two of them to the Dawson Elementary School, one mile from the Galloway home. Upon arriving at the school, the appellant ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing

plea that appellant permit her to leave. Appellant's sole response was to ask Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream. When she did not heed his warning to stop, the appellant, to impress upon Miss Galloway the seriousness of his warning, aimed his gun at her face and pulled the handle back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death. Immediately after firing the shot, the appellant returned to Miss Galloway's car. As he was driving out of the school yard he encountered Bobby Murray, Miss Galloway's boyfriend, driving in search of Miss Galloway. In his successful effort to elude Mr. Murray the appellant abandoned his victim's car and caught a ride to the East Wynnton section of Columbus where he spent the night with friends. On July 21, 1977, having spent the interim at his father's home in Columbus, the defendant fled to Atlanta, Georgia, there to be arrested on August 11, 1977. He made confessions to the crimes which were introduced into evidence.

This court holds the evidence in support of the verdicts legally sufficient since under such evidence any rational trier of fact could have found that the appellant was guilty beyond a reasonable doubt of each and every crime charged. Jackson v. Virginia, U. S. (SC) (Case No. 78-5283, decided June 28, 1979).

II. ENUMERATIONS OF ERROR.

On appeal, appellant enumerates five errors: his motion

for change of venue was overruled, his right to an impartial jury was denied, his two confessions and State's Exhibit # 17 (a photograph of teethmarks on the victim's left breast) were erroneously admitted into evidence, and the award of the death penalty was motivated by prejudice and passion.

1. For purpose of argument, appellant combines enumerations of error one and two into a single contention: the trial court erred in overruling his motion for change of venue based upon prejudicial pretrial publicity since the consequence of such denial was to deprive appellant of his right to trial by an impartial jury. Appellant's motion was supported by the introduction into evidence of 26 articles published by Columbus' two local newspapers between July 15, 1977, the date of commission of the crime, and August 23, 1977, twelve days after appellant had been arrested. The record contains no article published during the two and two-thirds months immediately preceding appellant's trial on Nov. 15, 1977; however, the transcript reflects that one article was published on Nov. 14, 1977, the very eve of the trial, wherein it was restated that appellant had confessed to the indicted crimes (the original statement, published August 14, 1977, also quoted from the text of the confession). Additional facts will be noted as necessary to the discussion.

The Sixth Amendment to the U. S. Constitution (U. S. Const. Amend. VI) combines with Code Ann. § 2-111 (Ga. Const. Art. I, Sec. I, para. XI) to assure that every person charged with offending the laws of this state shall have a public and speedy trial by an impartial jury.

Appellate courts must independently review the relevant trial court record in each case to insure compliance with these

constitutional dictates. Sheppard v. Maxwell, 384 U. S. 333, 362 (1965); U. S. v. McNally, 485 F.2d 398, 403 (8 Cir. 1973), cert. denied, 415 U. S. 978 (1974); U. S. v. Yeager, 472 F.2d 229, 239 (3 Cir. 1973).

We note that, under the Sixth Amendment, in order for an appellant to establish the denial of his right to an impartial jury, he must show either (a) actual juror partiality or (b) circumstances inherently prejudicial to that right. Murphy v. Florida, 421 U. S. 794, 803 (1974); Street v. State, 237 Ga. 307, 311 (227 SE2d 750) (1976), vacated on other grounds, 429 U. S. 995 (1976).

(a) The United States Supreme Court has defined actual juror partiality as follows:

"It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U. S. 717, 722-23 (1960) (citations omitted). Accord, Coleman v. State, 237 Ga. 84, 87 (226 SE2d 911) (1976), cert. denied, 431 U. S. 909 (1977).

In this present case, all twelve selected jurors testified on voir dire that they were without a fixed opinion as to appellant's guilt or innocence. The appellant protests, however, that this formal declaration of impartiality was impeached, in the case of one juror, by her admission that she held an "undecided" opinion as to the appellant's guilt based upon newspaper accounts of the Columbus police department's certainty that the appellant was Miss Galloway's assailant. This same juror, however, testified in explanation of the above that she understood the police made mistakes and that her "undecided" opinion would not preclude her from deciding appellant's guilt or innocence solely on the evidence presented at trial.

(b) Circumstances inherently prejudicial to the appellant's right to an impartial jury can impeach a juror's declaration of impartiality. As evidence of the presence of such circumstances in the present case, the appellant notes that 7 of the 12 selected jurors had knowledge of the crime, and that 5 of the 12 knew appellant had confessed (though only 1 of these 5 acknowledged even the possibility of recalling the details of the confession.) The appellant also notes that 2 of the twelve selected jurors were acquainted with the victim's family--one by reputation, the other by a single introduction several years prior to trial.

We are aware that a juror's extrajudicial knowledge regarding an appellant's present crime represents a serious potential for prejudice to that appellant's right to an impartial jury. However, such potential can be discounted under the Sixth Amendment if review of the pretrial publicity and total voir dire fails to demonstrate that the "totality of the circumstances" were inherently prejudicial. Murphy v. Florida, 421 U. S. 794 (1974).

We have held that a juror's extrajudicial knowledge of the victim, even when manifested by attendance at the victim's funeral, did not impeach per se that juror's declaration of impartiality. Coleman v. State, supra. Accordingly, we hold that, while a juror's extrajudicial knowledge regarding an appellant's crime, confession, and victim does indeed represent a serious potential for prejudice to that appellant's right to an impartial jury, such potential can be discounted under the Sixth Amendment if review of the pretrial publicity and total voir dire fail to demonstrate that "the totality of the circumstances" were inherently prejudicial.

In review of the pretrial publicity attending his case the appellant stresses, in addition to the sheer number of newspaper publications (26), the publication of parts of his confession, after the confession had been read into the public record at the appellant's preliminary hearing. The appellant further notes the emotionalism of the coverage, citing, in particular, one headline which read "Congregation Weeps For Its Slain Young Organist ", one editorial which commented that the murder of Miss Galloway had struck an especially responsive cord in the community, and, one photograph of the appellant captioned by the statement of the District Attorney that he intended to seek the death penalty at trial.

In Stroble v. California, 343 U. S. 181 (1951), the United States Supreme Court considered a pattern of pretrial publicity strikingly similar to the one in the present case. In upholding Stroble's conviction, the court stated:

> "He (the defendant) asks the court simply to read those stories and then to declare, over the contrary finding of 2 state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately 6 wks. before the beginning of

petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper accounts was made voluntarily and was introduced in evidence at the trial itself." (Emphasis added).

Thus, after observing the absence of any evidence of actual juror prejudice, the United States Supreme Court noted the remoteness in time between publicity and trial and the eventual admission of the prejudicial information into evidence as support for its refusal to hold that the appellant's right to an impartial jury had been presumptively violated. See Nebraska Press Assn. v. Stuart, 427 U. S. 539, 554 (1975); U. S. v. Mancusi, 445 F.2d 613, 618 (2 Cir. 1971). The same set of circumstances exists in the present case. There is an absence of any evidence of actual juror partiality. (See Part II, Division 1 (a) of this opinion). Further, all but one of the 26 articles were published 2 1/2 months before the appellant's trial and at trial the appellant's confessions were found to be voluntary and admitted into evidence. Accordingly, this court concludes that the pretrial publicity surrounding the appellant's trial did not constitute a circumstance inherently prejudicial to the appellant's Sixth Amendment right to an impartial jury.

This court is not unaware of Rideau v. Louisiana, 373 U. S. 723 (1963), wherein the United States Supreme Court found that the circumstance of a confession, televised 3 times approximately 2 months prior to the trial and never admitted into evidence, did demonstrate inherent prejudice to the appellant's right to an impartial jury. That same court, however, in Nebraska Press Assn. v. Stuart, 427 U. S. 539 (1975) made clear the continued vitality of Stroble, and the limited holding

of Rideau. In order to invoke the Sixth Amendment's presumption of juror partiality on the ground of inherently prejudicial pretrial publicity, an appellant must show "a trial atmosphere utterly corrupted by press coverage." Murphy, supra, at 798. (Emphasis added). Given the facts before this court, the present appellant has failed his burden.

Regarding review of the total voir dire, the United States Supreme Court suggested in Murphy that corroboration for a court's belief the pretrial publicity had not been inherently prejudicial could be found in the percentage of prospective jurors excused for partiality regarding the appellant's guilt. In the present case, only 4% (3 out of 75) of the prospective jurors were excused for partiality regarding the defendant's guilt. This very low percentage firmly reinforces our earlier conclusion that the pretrial publicity surrounding the appellant's case did not create a community bias inherently prejudicial to the appellant's right to an impartial jury. See Coleman, supra (49% dismissal rate--38 out of 77--held to corroborate absence of inherently prejudicial community bias); Butler v. State, 231 Ga. 276, 277 (201 SE2d 448) (1973) (36% dismissal rate--28 out of 77--held to corroborate absence of inherently prejudicial community bias); Cf. Murphy, 421 U. S. at 803 (62% dismissal rate--268 out of 430--held to corroborate the presence of actual juror partiality).

We note, in regard to the credibility of the above low percentage, that the trial court in this case conducted the individual voir dire of each prospective juror out of the presence of the others, and thereby eliminated the danger that sincere jurors might be influenced tomisstate their true feelings if asked, in the presence of their peers, to acknowledge their bias.

In conclusion, we hold that the 2 1/2 month period between the publicity and the trial, the low level of community bias as reflected in the tots' voir dire, and the admission into evidence of the defendant's confessions permit this court to discount the potential for prejudice admittedly present in the extrajudicial knowledge of the selected jurors in this case, and to find that the "totality of circumstances" surrounding the appellant's trial were not inherently prejudicial to the appellant's right to an impartial jury. These two enumerations are without merit.[1]

2. When an appellant objects to the admission into evidence of his confession, the state must prove, by a preponderance of the evidence, Lego v. Twomey, 404 U. S. 477, 489 (1972); U. S. v. Watson, 469 F.2d 362, 364 (5 Cir. 1972); High v. State, 233 Ga. 153, 154 (210 SE2d 673) (1974), that the confession was voluntary, and, if the confession is the product of a custodial interrogation by officers of the government, that the confession was preceded by the appellant's knowing and voluntary waiver of his Miranda rights. Miranda v. Arizona, 384 U. S. 436, 444 (1966); Goodwin v. State, 236 Ga. 339, 342 (223 SE2d 703) (1976).

1. Appellant, in his brief to this court, mentions the presence of television in the courtroom. We note here that the mere fact of a televised trial does not constitute evidence that the pretrial publicity surrounding the defendant's trial, which we have above held insufficient to sustain a finding that the appellant was denied his right to an impartial jury, was joined by media theatrics sufficient to convert the totality of courtroom circumstances into a "circus", and thereby deprive the appellant of his right to courtroom calm as enunciated by the United States Supreme Court in Sheppard v. Maxwell, 384 U. S. 333 (1966) and Estes v. Texas, 381 U. S. 532 (1964). We also note that appellant consented to the television coverage of his trial.

On appellate review, factual and credibility determinations by the trial court must be accepted unless such determinations are clearly erroneous. U. S. v. Watson, 469 F.2d 362, 365 (5 Cir. 1972); Johnson v. State, 233 Ga. 58 (209 SE2d 629) (1974).

It is the duty of this court to independently review the evidence to determine whether the state has carried its burden of proving the admissibility of appellant's confession by a preponderance of the evidence. U. S. v. Watson, 469 F.2d 362, 365 (5 Cir. 1972). Having done so, we firmly conclude that the state has carried its burden. See Hurt v. State, 239 Ga. 665, 669-70 (238 SE2d 542) (1977); Stevens v. State, 222 Ga. 603 (151 SE2d 127) (1966). See generally West v. U. S., 399 F.2d 467, 469 (1968), cert. denied, 393 U. S. 1102 (1969); Riley v. State, 237 Ga. 124, 128 (226 SE2d 922) (1976).

3. Dr. Joe Martin Webber testified at trial that he had observed a series of teethmarks on Miss Galloway's left breast during performance of the autopsy on July 16, 1977. He was shown the state's original Exhibit # 17 and asked if he could recognize from it the teethmarks he had observed during the autopsy. After responding negatively, Dr. Webber produced a photograph which he testified was a true and correct representation of Miss Galloway's breast area at the time he had taken the photograph. Following substitution of the doctor's photograph as the new State's Exhibit # 17, said exhibit was admitted into evidence over the following objections by the defendant: first, that the photograph was irrelevant by virtue of Dr. Webber's failure to testify when the marks had been made, whether they were inflicted violently, or whether they were inflicted by man, woman, or child, much less this particular defendant; and, second, that given the photograph's cumulative evidentiary value (Dr. Webber having already

testified to what the photograph showed), its probative worth was so outweighed by its probative danger that its exclusion from the jury was demanded.

Georgia law provides that a photograph, relevant to a material fact, is admissible in evid nce if authenticated and if possessed of a probative value not substantially outweighed by probative danger. Floyd v. State, 233 Ga. 280, 283 (210 SE2d 810) (1974); see Shaw v. State, 241 Ga. 308, 311 (245 SE2d 262) (1978). Further, the above determinations are assigned to the sound discretion of the trial judge and will not be disturbed on appeal except for abuse of that discretion. Thornton v. Thornton, 232 Ga. 666, 667 (208 SE2d 557) (1974); J. D. Jewell, Inc. v. Hancock, 226 Ga. 480, 487 (175 SE2d 847) (1970).

In this case, appellant was indicted for the crime of rape, which Georgia law defines as carnal knowledge of a female, forcibly and against her will. Thus, a material fact in issue before the jury was whether the defendant had achieved carnal knowledge of Miss Galloway by force. We hold the trial judge did not abuse his discretion in ruling that State's Exhibit # 17, depicting the presence of teethmarks on Miss Galloway's left breast, rendered the material fact of force more probable than it would have been without the evidence.

In objecting to the photograph because Dr. Webber did not testify when the teethmarks had been made or whether they had been inflicted by a man, woman, or child, appellant seems to demand, as a condition to admissibility, that the photograph be relevant to who raped Miss Galloway. Relevancy is the tendency to establish any material fact. In objecting

that Dr. Webber did not state whether the teethmarks were inflicted violently, defendant raises a point that would be more persuasive if his objection were to either the sufficiency of the photograph, a question of law for the court, or the weight of the photograph, a question of persuasion for the jury. T. Green, the Georgia Law of Evidence, § 82, p. 194-96 (1957). It is not persuasive in an objection to the photograph's relevancy.

The trial judge in the case before us did not abuse his discretion in admitting the photograph. Lamb v. State, 241 Ga. 10, 12-13 (243 SE2d 59) (1978); Reddish v. State, 238 Ga. 136, 139 (231 SE2d 737) (1977).

III. SENTENCE REVIEW.

4. In reviewing the charge of the court in the sentencing phase of the trial relating to circumstances in mitigation and aggravation, we conclude that this portion of the charge clearly meets the criteria laid down in Fleming v. State, 240 Ga. 142 (7) (240 SE2d 37) (1977); Hawes v. State, 240 Ga. 327 (9) (240 SE2d 833) (1978); and Spivey v. State, 241 Ga. 477 (2) (241 SE2d 236) (1978), cert. denied ___U. S. ___ 99 SC 642.

5. A review of the evidence during the sentencing phase of the trial shows that the defendant called his mother and two sisters as witnesses in an attempt to show mitigating circumstances in his behalf. During the testimony of these witnesses, the district attorney made numerous objections based on hearsay, irrelevancy, conclusion of the witness, etc., most of which were sustained by the court. In response to defense counsel's statement that "I thought the rules were much more liberal on the sentencing phase," the court replied "...its got to be admissible evidence." The court overruled one objection and told counsel to "keep her within reasonable bounds."

We find no error under the facts of this case since the witnesses, despite the objections which were sustained, were able to convey to the jury the circumstances concerning the defendant's premature birth, being raised in a broken home, severely beaten and mistreated by a step-father, his early offenses as a juvenile, and other matters which the jury might consider as mitigating circumstances.

This court is of the opinion that evidence as to mitigation should not necessarily be confined to the strict rules of evidence. The trial court should exercise a broad discretion in allowing any evidence reasonably tending toward mitigation. Of course the court is authorized to hold witnesses "within reasonable bounds," as was done in this case. See Collier v. State Case No. 35063, decided Oct. 30,1979.

6. Appellant's final enumeration of error raises the same issue as the first third of this court's mandatory death sentence review as outlined in Code Ann. § 27-2537(c) (1-3) (Ga. L. 1973, p. 159); accordingly, it shall be incorporated into this section's fulfillment of the cited statutory duty.

First, we conclude that the sentence of death imposed in this case for the crime of murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Secondly, we conclude that the statutory aggravating circumstances found by the jury (murder while the offender was engaged in the commission of rape and armed robbery; and murder outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim (sic)) were supported by sufficient evidence. (Regarding rape and armed robbery, see Part I of this opinion; regarding depravity of mind, see Johnson v. State, 242 Ga. 649, 656 (250 SE2d 394) (1978).

Thirdly, in reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed and we find that the cases listed in the appendix support afirmance of the death penalty. This case involves an absolutely unprovoked murder while the appellant was in the commission of armed robbery, kidnapping, and rape. William Anthony Brooks' sentence to death is neither excessive nor disproportionate to the penalty imposed in similar crimes considering the crime and the appellant.

Judgment affirmed. All the Justices concur, except as to Division 6, Hill, J., concurs in the judgment only.

APPENDIX: Murder Cases:

House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1975); Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975); Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975); Berryhill v. State, 235 Ga. 549 (221 SE2d 185) (1975); Gibson v. State, 236 Ga. 874 (226 SE 2d 63) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Goodwin v. State, 236 Ga. 339 (223 SE2d 703) (1976); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Morgan v. State, 241 Ga. 485 (246 SE2d 198) (1978); Drake v. State, 241 Ga. 583 (247 SE2d 57) (1978).

CHARGE OF THE COURT

Ladies and gentlemen, the defendant in this case has been found guilty of the offense of murder, and it is now your duty to make certain decisions that will affect the sentence which the Court will impose as punishment for that offense. Under the law of this State, every person found guilty of murder shall be punished by death, or imprisonment for life.

I charge you that, although under the law of Georgia the Judge, that is, the Court, that I will fix the sentence, the determination that you will now make will affect the sentence which will be prescribed. Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.

Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following Statutory, aggravating circumstances existed beyond a reasonable doubt:

Number One

The offense of murder was committed while the offender was engaged in the commission of

another capital felony, to wit: rape.

and/or

Number Two

The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery.

and/or

Number Three

The offense of murder was outrageously, or wantonly vile, horrible or inhuman, in that it involved an aggravated battery to the victim.

Now, ladies and gentlemen, if you find that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.

On the other hand, you can see fit, ladies and gentlemen, whether aggravating circumstances existed or not, to recommend mercy for the defendant if this should be your finding, then in that event the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant.

You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those, ladies and gentlemen, which increase the guilt or the enormity of the offense, or add to its injurious consequences.

Now, ladies and gentlemen, the form of your verdict fixing punishment will be one of the following and should read: One, the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: rape, and we recommend the death penalty.

Two, the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery, and we recommend the death penalty.

Or, Three, the offense of murder was outrageously and wantonly vile, horrible or inhuman, in that it involved an aggravated battery to the victim, and we recommend the death penalty.

Now, ladies and gentlemen, even though you find

Statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

Should you fail to find aggravating circumstances, then the form of your verdict would be, "We, the jury, recommend mercy." Should this be your verdict it would mean that the Court would sentence the defendant to life imprisonment.

Your decision, ladies and gentlemen, must be unanimous, it must be in writing, and dated, and signed by your foreman.

Now, the law requires, ladies and gentlemen, that I submit the charge that I just gave to you in writing, and you will be allowed to take that out with you.

By way of summation, ladies and gentlemen, you have an option of three verdicts that you may return in this case: Number one is; "We, the jury, find the following aggravating circumstances," and in which case you would write in the blanks that have been provided on the verdict form for you, what aggravating circumstances you find to have existed, and then the verdict would read, "and we recommend the death penalty, this 18th day of November, 1977," signed by your foreman.

The next form of your verdict would be, "We, the jury find the following aggravating circumstances," and you would fill in the blanks of the verdict that are provided

for that purpose, what aggravating circumstances you find to exist, if you so find, and the verdict then reads, "and we do not recommend the death penalty, this 18th day of November, 1977."

The third form of the verdict, ladies and gentlemen, to be considered by you is, "We, the jury, having found the defendant guilty of the offense of murder, and we having found no aggravating circumstances, we, the jury, recommend mercy, this 18th day of November, 1977," signed by your foreman, in that event the defendant would receive a sentence of life imprisonment.

These three optional forms of verdict will be sent out with you, ladies and gentlemen, and your foreman will use whichever one appropriate, according to the vote of the jury.

After you have unanimously reached a verdict, have your foreman then to complete the verdict in whatever respect is necessary, and to sign it, and return it into Court. Please retire, ladies and gentlemen, to the jury room.

(At 2:58 o'clock p.m., the jury retires to begin deliberations;

At 3:50 o'clock p.m., the jury returns to the Courtroom with a verdict.)

IN THE SUPREME COURT OF
THE UNITED STATES

NO. 79-6330

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF GEORGIA

BRIEF FOR THE RESPONDENT
IN OPPOSITION

Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6330

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

INDEX

Page

QUESTION PRESENTED. 1

STATEMENT OF THE CASE. 2

REASON FOR NOT GRANTING THE WRIT

I. GEORGIA'S DEATH PENALTY LAW, UPHELD BY THIS COURT IN GREGG v. GEORGIA, 428 U.S. 153 (1976), IS CONSTITUTIONAL. 4

CONCLUSION. 11

CERTIFICATE OF SERVICE. 12

TABLE OF AUTHORITIES

Cases Cited: **Page**

Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). 2

Cardinale v. Louisiana, 394 U.S. 437 (1969). 4

Furman v. Georgia, 408 U.S. 238 (1972). 6

Godfrey v. Georgia, Case No. 78-6899. 4

Gregg v. Georgia, 428 U.S. 153 (1976). 1,4,6,10

Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979). 5

Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976). 5

Lockett v. Ohio, 438 U.S. 586 (1978). 6,9

Roberts v. Louisiana, 428 U.S. 325 (1976). 6

Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976). 5

Tacon v. Arizona, 410 U.S. 351 (1973). 4

Woodson v. North Carolina, 428 U.S. 280 (1976). 6

Statutes Cited:

Ga. Code Ann. § 27-2534.1(b)(7). 4

Ga. Code Ann. § 27-2537(c)(2). 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6330

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

I.

Is Georgia's death penalty law, previously upheld in Gregg v. Georgia, 428 U.S. 153 (1976), constitutional?

STATEMENT OF THE CASE

Petitioner, William Anthony Brooks, was convicted in the Superior Court of Muscogee County, Georgia, for the kidnapping, rape, armed robbery and murder of Carol Jeannine Galloway. The jury found two statutory aggravating circumstances: (1) the murder was committed while the offender was engaged in the commission of rape and armed robbery and (2) the murder was outrageously or wantonly vile, horrible or inhuman.

Brooks' convictions and sentences [1] were affirmed by the Supreme Court of Georgia in Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). The evidence, set forth in detail in the appellate decision, showed that Brooks accosted Miss Galloway, age 23, at gunpoint in the front yard of her parents' residence and, at gunpoint, ordered her to get into her car and drive away.

> . . .[Brooks] ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20.00 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing plea that appellant permit her to leave. Appellant's sole response was to ask Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream.

---

[1] Brooks was sentenced to death for murder, to life for kidnapping and rape, and to twenty years for armed robbery.

> When she did not heed his warning to stop, the appellant, to impress upon Miss Calloway the seriousness of his warning, aimed his gun at her face and pulled the handle back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death.

Id. at 575. Brooks fled, and was not captured for almost one month. After arrest, he confessed to the crimes and his confessions were introduced into evidence. Id.

REASONS FOR NOT GRANTING THE WRIT

I. GEORGIA'S DEATH PENALTY LAW, UPHELD BY THIS COURT IN GREGG v. GEORGIA, 428 U.S. 153 (1976), IS CONSTITUTIONAL.

Petitioner enumerates three reasons for which the writ of certiorari should be granted. As Petitioner notes, none of the issues has been presented to the Supreme Court of Georgia. Of course, this Court does not decide issues raised for the first time in petitions for writs of certiorari. See, e.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). However, because the issues presented are purely legal questions involving settled principles of law, Respondent will address those issues briefly and this Court may determine that the writ should not issue for the reasons presented.

A. Ga. Code Ann. § 27-2534.1(b)(7) is not unconstitutionally vague; furthermore, the jury found a second aggravating circumstance.

In his first attack on Georgia's death penalty statute, Petitioner asserts that Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague. Contrary to Petitioner's assertion, the identical issue is not presently pending before this Court in Godfrey v. Georgia, No. 78-6899. Godfrey is a case in which Ga. Code Ann. § 27-2534.1(b)(7) is the only statutory aggravating circumstance found by the jury; the narrow issue presented in Godfrey is whether the seventh aggravating circumstance was unconstitutionally applied in that case.

In the present case, the jury found two aggravating circumstances. In addition to finding the murder vile, horrible and inhuman, the

jury found that the murder was committed while the offender was engaged in the commission of two other capital felonies, armed robbery and rape.

In Harris v. State, 237 Ga. 718, 732, 230 S.E.2d 1 (1976), sentence vacated on other grounds, Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979), the court recognized the possibility of abuse of the seventh statutory aggravating circumstance and stated "[u]nder our duty specified in Code Ann. § 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence." Clearly, the Supreme Court of Georgia recognizes its duty under the law and has evidenced its intent to perform that duty properly.

However, the present case does not present the issue of the seventh aggravating circumstance being used as a "catch all" to impose a death penalty in the absence of any other aggravating circumstance. Brooks kidnapped his victim from her parents' home, raped her, robbed her, ignored her pleas to be released, and, as the young girl screamed, shot her, causing her to bleed to death two hours later. Thus, the jury was authorized to find and did find that Ga. Code Ann. § 27-2534.1(b)(2) was twice present in that Brooks murdered his victim during the commission of a rape and an armed robbery. Even if the seventh statutory aggravating circumstance were unconstitutional, and it is not, the evidence supported the jury's finding of another aggravating circumstance, therefore the sentence would not be impaired. See, e.g., Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976).

B. As already determined by this Court, the Georgia death penalty statutory scheme does not grant unlimited, unguided discretion to the jury.

Petitioner next contends that the trial court failed to instruct the jury on guides, standards or reasons to be used in recommending not to impose the death penalty. The contention apparently is that the trial court should have given more specific instructions on when the jury could recommend mercy. The argument, carried to its logical conclusion, is that the jury can recommend mercy in only the most limited circumstances. A statutory scheme either written or applied in the manner suggested by Petitioner might well run afoul of those concerns voiced by this Court in Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978).

This Court was concerned in Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976) with the likelihood of inflicting the death penalty in an arbitrary nd capricious manner, not with the unrestricted license of a jury to extend mercy to a convicted defendant. Surely Petitioner does not argue that this Court in Gregg required a trial judge to set guidelines within which the jury could consider granting mercy to the defendant. The concerns of this Court, most recently in Lockett v. Ohio, supra, have been with impermissible limitations on the jury's consideration of mitigating evidence, not with the necessity of creating boundaries within which a jury must remain in order to recommend a sentence other than death. Gregg v. Georgia, supra, explicitly recognized the discretion of the jury in deciding not to impose the death penalty.

Nevertheless, a review of the trial court's sentencing instruction shows a thorough and accurate charge to the jury. The trial court instructed:

> . . .Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.
>
> Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following Statutory, aggravating circumstances existed beyond a reasonable doubt. . .

(T. 885). After instructing the jury on the pertinent statutory aggravating circumstances, the trial court continued:

> Now, ladies and gentlemen, if you find that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.
>
> On the other hand, you can see fit, ladies and gentlemen, whether aggravating circumstances existed or not, to recommend mercy for the defendant if this should be your finding, then in that event the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those, ladies and gentlemen, which increase the guilt or the enormity of the offense, or add to its injurious consequences.

* * *

Now, ladies and gentlemen, even though you find Statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

(T. 886-88). The jury was plainly instructed that it could recommend a sentence of death only if it found statutory aggravating circumstances. The jury was further instructed that even if it found such circumstances it need not impose a death penalty and could in its discretion recommend mercy. Finally, the jury was

told that unless aggravating circumstances existed, a life sentence only could be imposed.

One cannot imagine a more explicit and correct instruction to the jury on its role under the Georgia death penalty statute.

Defendants of an earlier day attacked rigid and mechanistic imposition of the death penalty. Petitioner's theory, if put into practice, would reimpose those rigid and mechanistic standards to considerations of mercy.

C. The trial court properly instructed the jury on mitigating evidence.

Petitioner's narrow approach extends as well to the area of mitigating evidence. He argues that the courts have a duty to develop a definition of mitigating evidence and to instruct the jury on that definition.

The trial court's instruction, having been excerpted in pertinent part in the previous portion of this brief, need not be recited a second time. It is apparent that the jury was instructed o. the definition of mitigating circumstances and that the definition given was liberal and open. The jury was also instructed that they could consider all evidence presented during the trial. Thus, as provided by the statute, the trial jury was free to consider any evidence whatsoever which had been presented at trial in determining whether mitigating evidence existed. Petitioner's argument that the jury should have been given additional guidance in considering mitigating evidence comes very close to the statutory provisions which this Court condemned in Lockett v. Ohio, supra.

The ability of the jury to consider a wide range of mitigating circumstances without limitation when assessing the appropriate penalty to impose was one factor considered by this Court in

upholding Georgia's death penalty in Gregg v. Georgia, supra.

> . . .The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute. . .

Gregg v. Georgia, 428 U.S. 153, 222 (1976)(White, J., concurring). It is evident the jury was given wide discretion in considering mitigating evidence. That discretion should not be curtailed.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Don A. Langham
DON A. LANGHAM
First Assistant
Attorney General

John C. Walden
JOHN C. WALDEN
Senior Assistant
Attorney General

Daryl A. Robinson
DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Captiol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. John J. Callahan
Attorney for Petitioner
645 National Bank Building
Toledo, Ohio 43604

This 21st day of April, 1980.

Daryl A. Robinson
DARYL A. ROBINSON